Public Prosecutor v Pham Thi Tuyet Mai (W/Vietnam)

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45B-37–08 OF 2014
ZULKIFLI BAKAR J
22 JULY 2016

Criminal Law — Murder — Defence — Accused charged with offence of murder — Accused pleaded defence of insanity — Whether accused unsound — Whether expert witness credible — Whether conduct of accused at crime scene showed that accused understood nature of her act — Criminal Procedure Code ss 347 & 348 — Penal Code s 302

The accused was charged with the offence of murder of one Huynh Thi Y ('the deceased') under s 302 of the Penal Code. The prosecution's case was that the main cause of death was the cut wound on the deceased's neck and that from the chemist report, it was inferred that the accused could have used five weapons ie knives marked Nos 8, 9, 10, 11 and 12 in injuring the deceased although the accused's housemate ('SP1') said that she saw the accused was using two weapons. It was also the evidence of SP1 that after the incident, she heard the accused asked the deceased why was the deceased sleeping. The accused's argument was based on the defence of insanity and for this purpose the defence had called two witnesses namely the accused and the medical doctor ('SD2'). The accused gave written unsworn statement from the dock. The accused stated that she had previously went back to Vietnam to get a traditional treatment as she always felt that someone wanted to kill her. The accused testified that, on the day of the incident she took ecstasy pill and had stabbed the deceased, but was still confused as to what had actually happened. The issues for court's decision were: (a) whether the accused had been a person of unsound mind; (b) whether SD2 was a credible witness; and (c) on the conducts of the accused at the scene of the incident.

Held, acquitting the accused:

(1) The court found that the accused with the persisted effects of substance abuse leading to seek for traditional treatment in Vietnam had successfully put in the defence of insanity as the accused was affected by this mental illness when committing the offence. This was due to at that material time, the accused did not understand the nature and quality of her actions, as corroborated by SP1 who heard the accused asked the deceased why was the deceased sleeping (see para 32).

(2) The court was entitled to accept the opinion of SD2 and the medical report from Hospital Bahagia Ulu Kinta dated 23 February 2015

('D133') on its face value unless the prosecution had called another expert evidence in rebuttal to contradict her. The investigating officer had a duty to uphold fairness towards the accused throughout the investigation process. Hence following the arrest and statement recording, the investigating officer should have sent the accused immediately to the medical doctors for examination. His failure should not be used by the prosecution to complaint and used for the prosecution's advantage (see paras 34 & 37–38).

(3) On the issue that the accused had hidden the knives, the prosecution had not tendered proof to confirm that it was the conduct of the accused. The evidence of the mop inside the pail was not sufficient to establish that it was the accused that had used it to clean the scene since there were blood traces still remained there. Based on the evidence, the court decided that the accused truly did not understand the nature of her act at the time of killing the deceased and thus the court ordered for the accused to be acquitted pursuant to s 347 of the Criminal Procedure Code (see paras 40–42 & 45–46).

[Bahasa Malaysia summary

Tertuduh dipertuduh dengan kesalahan membunuh seorang yang bernama Huynh Thi Y ('si mati') di bawah s 302 Kanun Keseksaan. Kes pihak pendakwaan adalah bahawa punca utama kematian adalah luka tikaman pada leher si mati dan bahawa daripada laporan ahli kimia, ia dibuat kesimpulan bahawa tertuduh mungkin menggunakan lima senjata iaitu pisau yang ditanda No 8, 9, 10, 11 dan 12 dalam mencederakan si mati walaupun teman serumah tertuduh ('SP1') menyatakan bahawa dia nampak tertuduh menggunakan dua senjata. Ia juga adalah keterangan SP1 bahawa selepas kejadian itu, dia mendengar tertuduh menanya si mati mengapa si mati tidur. Hujahan tertuduh adalah berdasarkan atas pembelaan hilang akal dan bagi tujuan ini pembelaan telah memanggil dua saksi iaitu tertuduh dan doktor perubatan ('SD2'). Tertuduh memberi pernyataan bertulis yang tidak bersumpah daripada kandang. Tertuduh menyatakan bahawa dia sebelum ini pulang ke Vietnam untuk mendapatkan rawatan tradisional kerana dia selalu berasa bahawa seseorang hendak membunuhnya. Tertuduh memberi keterangan bahawa, pada hari kejadian tersebut dia mengambil pil khayal dan membunuh si mati, tetapi masih binggung terhadap apa sebenarnya yang telah berlaku. Isu-isu untuk keputusan mahkamah adalah: (a) sama ada tertuduh adalah seorang yang tidak sempurna akal; (b) sama ada SD2 adalah saksi yang boleh dipercayai; dan (c) atas tingkah laku tertuduh di tempat kejadian tersebut.

Diputuskan, membebaskan tertuduh:

(1) Mahkamah mendapati bahawa tertuduh dengan kesan berterusan penyalahgunaan bahan sehingga mendapatkan rawatan tradisional di Vietnam telah berjaya memasukkan dalam pembelaan hilang akal kerana

tertuduh telah dijejaskan oleh sakit mental ini apabila melakukan kesalahan. Ini adalah akibat pada masa material, tertuduh tidak faham sifat dan kualiti tindakannya, seperti yang disokong oleh SP1 yang mendengar tertuduh menanya si mati mengapa si mati tidur (lihat perenggan 32).

(2) Mahkamah berhak menerima pendapat SD2 dan laporan perubatan daripada Hospital Bahagia Ulu Kinta bertarikh 23 Februari 2015 ('D133') atas nilai mukanya kecuali pihak pendakwaan telah memanggil pakar keterangan yang lain dalam mematahkan untuk menentangnya. Pegawai siasatan mempunyai tugas untuk menegakkan keadilan terhadap tertuduh sepanjang proses siasatan tersebut. Maka dikuti dengan penangkapan dan perekodan pernyataan, pegawai siasatan patut menghantar tertuduh serta merta kepada doctor-doktor perubatan untuk pemeriksaan. Kegagalannya tidak patut digunakan oleh pihak pendakwaan untuk mengadu dan digunakan bagi faedah pihak pendakwaan (lihat perenggan 34 & 37–38).

(3) Atas isu tertuduh telah menyembunyikan pisau-pisau tersebut, pihak pendakwan tidak menenderkan bukti untuk mengesahkan bahawa ia adalah tingkah laku tertuduh. Keterangan pengelap lantai berada dalam baldi tidak mencukupi untuk membuktikan bahawa ia adalah tertuduh yang menggunakannya untuk membersihkan tempat kejaidan memandangkan terdapat kesan darah masih kekal di situ. Berdasarkan keterangan, mahkamah memutuskan bahawa tertuduh memang benar tidak memahami sifat tindakannya pada masa membunuh si mati dan oleh itu mahkamah memerintahkan tertuduh dibebaskan berikutan s 347 Kanun Tatacara Jenayah (lihat perenggan 40–42 & 45–46).]

Notes

For cases on defence, see 4(2) *Mallal's Digest* (5th Ed, 2015) paras 1756–1805.

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

John a/k Nyumbei v PP [2007] 7 MLJ 206; [2007] 2 CLJ 509, CA (refd)

M'Naughten [1843] All ER Rep 229 (refd)

PP v Mohd Amin bin Mohd Razali & Ors [2002] 5 MLJ 406; [2002] 5 CLJ 281, HC (refd)

Suresh a/l Selvaraj v PP (Case No 45–4 of 2007) (unreported), HC (refd)

Legislation referred to

Criminal Procedure Code ss 342, 342(3), 347, 348(1), (2)

Penal Code ss 84, 302

Noor Husnita bt Mohd Radzi (Deputy Public Prosecutor, Attorney General's Chambers) for the plaintiff.
Ariff Azami bin Hussein (Azizzul & Ariff); Salim bin Bashir Bhaskaran (Salim Bashir, Ruswiza & Co) for the defendant.

Zulkifli Bakar J:

INTRODUCTION

[1] This is the case that I had previously heard and ordered the accused to be acquitted without defence being called on the ground of mental disorder. As for now, the Court of Appeal, via order dated 16 March 2016, remitted the case to this court for defence to be called in accordance with the procedures specified in law. I, therefore, reproduced the necessary chronological facts for ease of reference.

[2] The accused was charged with an offence of murder of one Huynh Thi Y under s 302 of the Penal Code.

[3] The charge (P2) against the accused was read as follows:

> That you, on the 2nd August 2013, at around 11:00 a.m, at No. 23, Jalan Pahlawan 11/3, Bandar Mahkota Cheras, Kajang in the District of Daerah Hulu Langat, in the State of Selangor, did committed murder of one Huynh Thi Y (Passport No. B7658079) and thereby committed an offence punishable under s 302 of the Penal Code.

[4] On 26 January 2015, the case was fixed for hearing. However, before the commencement of trial, the defence counsel made an application to the court to send the accused for examination by a psychiatrist because of suspecting the accused to be of unsound mind during the incident.

[5] I investigated this matter before making any decision in order to avoid the abuse of provision of s 342 of the Criminal Procedure Code and thus cause delay of the trial of this case.

(a) the questions that I had posed to the accused, aided by the interpreter, were as follows:

(i) firstly, whether the accused heard some strange voices and saw hallucination during the incident? The accused answered 'yes'; and

(ii) secondly, why didn't the accused inform that to the police, prison officer or lawyer prior to this? The accused replied that she had no idea about what to do. She also said that she had just informed her

strange condition to the lawyer around three weeks before the trial today;

(b) from my observation of the accused in the dock, I noticed that the accused looked puzzled and lost when asked questions about being in court and she admitted to have committed the offence as charged; and

(c) as a result of this, I am satisfied that there is a reason to suspect the accused was incapable of making her defence and therefore the court applied s 342(3) of the Criminal Procedure Code to postpone the trial and ordered her to be remanded for a period of not exceeding one month to be detained for observation in any mental hospital in Malaysia. The trial was adjourned to another date pending observation of a certified medical doctor.

[6] The medical report from Hospital Bahagia Ulu Kinta dated 23 February 2015 ('D133') had evidently and succinctly provided that the accused was certified or fit to be capable of making her defence. Hence, the court proceeded with the trial on 2 March 2015.

PROSECUTION'S CASE

[7] The accused, a Vietnam national, came from Vietnam to Malaysia and worked as waitress at a night club karaoke.

[8] The accused stayed with six others in a double storey house at No 23, Jalan Pahlawan 11/3, Bandar Mahkota Cheras, Kajang in the District of Daerah Hulu Langat, in the State of Selangor ('the scene'). They were Ha Ngoc Lich ('SP1'), Wong Zey Heong, Dang Thi Thu Ha, Tran Diem My, Nguyen Thi Son and Huynh Thi Y ('the deceased').

[9] In the early morning of 2 August 2013, SP1 went out to market with her friend, Tran Diem My. Around 10am, they returned to the house and after having breakfast they went up to SP1's room at the upper floor for a rest. On the way up to her room, SP1 saw the deceased was sleeping below the staircase. At that material time, SP1 also saw the accused was on her way down from her room situated at the upper floor of the house.

[10] After five minutes, SP1 heard the scream from the deceased and also the words uttered by the deceased, 'why did you want to kill me?'. Subsequently, SP1 went to look as to what had actually happened. She saw the accused was holding two knives in each hand where one knife was used to cut the deceased's left neck and another knife was used to stab at the back of the deceased repeatedly.

[11] SP1 was in fear of what she saw and then returned to her room to inform this to Tran Diem My. Tran Diem My immediately called Michael Wong Ho Sang ('Michael') for help.

[12] It took Micheal and his brother-in-law, Saw Jen Sang ('Sang') about ten minutes to reach the house. SP1 went down to open the door for them. At that material time while SP1 was walking past the deceased's body and the accused, she testified that she saw the accused was sitting beside the deceased's body which was motionless. SP1 heard the accused asked the deceased why was the deceased sleeping. Not only that, the accused also laughed at the deceased. After a while, the accused became very quiet. The accused remained at the same spot but without holding any weapon anymore.

[13] Without any delay, Sang carried the deceased to a car which they came with. After that, all of them including other residents of the house went together to Hospital Sg Long, Kajang and left the accused alone in the house without locking the door of the house.

[14] Upon reaching Hospital Sg Long, Sang carried the deceased's body to the emergency zone. After around 30 minutes, a doctor came out and announced the death of the deceased.

[15] At 2.28pm, the investigating officer — ASP Chay Hu Yan ('SP2') received a call from ASP Nallasamy that one Vietnamese girl had passed away in Hospital Sg Long vide Kajang Report No 25831/13 ('P8'). Soon after that, SP2 together with ASP Mobin and Photographer Arif quickly rushed to the Hospital Sg Long.

[16] At 3.30pm, SP2 was informed by ASP Mazuri that five local Chinese men, one local Chinese girl and five Vietnamese girls were arrested for investigation purpose. Later at 4pm, SP2 and the said photographer Arif arrived at the scene.

[17] The forensic team led by Inspector Yam reached at the scene at 4.20pm for investigations. The exhibits collected in the investigations were then handed over by Insp Yam to SP2 at 8pm with 'Borang serah-menyerah' ('P17') executed between them after the forensic team had completed their investigations at the scene.

[18] SP2 kept the exhibits in his working place where only he himself had the access key to it until 13 August 2013 where SP2 facilitated the same exhibits to be sent to Jabatan Kimia Malaysia for analysis. This is evidenced by the receipts ('P33 and P34') and the chemist reports received subsequently ('P35 and P36'). From the chemist report ('P35'), the inference that can be drawn is that

the accused could have used five weapons ie knives marked No 8 ('P53'), No 9 ('P54'), No 10 ('P55'), No 11 ('P56') and No 12 ('P57') in injuring the deceased although SP1 said that when she saw the incident, the accused was using two weapons.

[19] Furthermore, on 4 August 2013, SP2 with the photographer Arif, SP1 and the deceased's father went to Hospital Serdang for post-mortem examination (photos as in P41(1–142)) and identified the deceased's body. The pathologist, Dr Abdul Karim bin Tajudin who conducted the post-mortem examination on the body of the deceased had prepared his post-mortem report ('P37') where he concluded that she died mainly due to the cut on her neck and I reproduce as follows:

> 3. Luka tikam di leher (No. 22) telah memotong pembuluh darah carotid utama yang menyebabkan kematian ...
>
> 5. Pemeriksaan bedah siasat telah menunjukkan yang kematian si mati adalah disebabkan oleh luka tikam di leher.

Althought it was found that there were several stab wounds on the deceased's body, the main cause of death was the cut or incised wound of her neck which had severed her carotid artery.

FINDINGS AT THE END OF PROSECUTION'S CASE

[20] According to the established practices and also following the said order from the Court of Appeal, at the end of the prosecution's case, this trial court should have ruled the prosecution had established prima facie case against the accused upon maximum evaluation of the available evidences. I also emphasise that the defence counsel from the beginning of the case had indicated expressly that there was no dispute on the defence's part concerning the elements of the charge.

DEFENCE'S CASE

[21] Subsequently, this court called upon the accused to enter her defence. The defence had called two witnesses namely the accused ('SD1') and the medical doctor, Dr Hjh Rabaiah Mohd Salleh ('SD2').

[22] The accused selected to give written unsworn statements from the dock. The accused said this:

> Nama saya Pham Thuyet Mai, saya warganegara Vietnam. Umur saya 32 tahun.
>
> Saya datang ke Malaysia tahun 2012. Saya dulu bekerja sebagai pelayan di pusat hiburan.

Dulu saya banyak minum arak dan ambil dadah. Saya ambil pil 'ecstasy'. Saya selalu sakit dan rasa takut, perasaan saya selalu terganggu. Saya ada masa rasa sangat suka dan ada masa rasa sangat sedih dan takut.

Saya selalu rasa macam ada orang mahu membunuh saya dan saya dalam bahaya. Saya tak boleh tahan, dan saya balik ke Vietnam untuk satu bulan bagi rawatan tradisional.

Selepas satu bulan, saya rasa saya boleh balik ke Malaysia dan kerja semula. Mula-mula saya tak sakit, tapi lama-lama, saya rasa macam gangguan emosi lagi, saya perasaan bahawa saya macam dengar ada bunyi dalam kepala saya, saya selalu nangis dan tak mahu campur kawan-kawan lain.

Sekali lagi, saya ambil pil ecstasy setiap malam, saya juga tak boleh tidur malam. Saya selalu bangun malam, jalan-jalan dalam rumah saya. Saya selalu mimpi macam-macam perkara yang menakutkan.

Pada hari saya bunuh Huynh Thi Y, saya hanya boleh ingat, saya bangun tidur, saya dan Huynh Thi Y sudah ubah jadi hantu.

Saya dengar macam-macam suara dalam kepala saya dan saya tengok, saya mesti mahu bunuh Huynh Thi Y supaya itu hantu boleh mati, dan saya perlu bunuh Huynh Thi Y untuk bukti samada Huynh betul-betul sudah jadi hantu.

Saya masuk dapur untuk ambil dua pisau, tapi saya tidak mahu bunuh, saya jalan-jalan dalam ruang dapur dan ruang tamu.

Saya sangat runsing, saya dengar macam-macam suara dan lihat macam-macam orang. Saya takut, saya ada naik tangga mahu masuk bilik, tapi saya tak tahu kenapa, saya tak masuk bilik, saya turun balik, saya terus pergi dekat Huynh Thi Y dan saya tikam dia.

Itu sahaja saya ingat, tapi saya selepas itu ada panggil dia supaya bangun dari tidur. Saya tengok banyak darah. Saya duduk dengan Huynh Thi Y, saya panggil dia lagi.

Saya ada cakap dengan kawan lain, tolong panggil Huynh Thi Y suruh bangun mahu keluar, tapi mereka lari.

Saya sehingga beberapa hari, saya tak ingat saya sudah tikam mati Huynh Thi Y.

Saya jerit, nangis bila tahu dia sudah mati. Saya kawan baik dia, kami kerja di tempat yang sama dan tidur bilik yang sama. Sehingga hari ini, saya sedih dan keliru apa yang telah berlaku.

Itu sahaja saya mahu cakap.

FINDINGS AT THE END OF DEFENCE'S CASE

[23] This court is aware that, it was substantive right of the accused to give unsworn statement from the dock. Be that as it may, it is trite law that this court is duty bound to assess and consider the unsworn statement but the weight attached to such unsworn statement is definitely lower than the sworn evidence in the witness box. In this context, it is noteworthy to read the judgment of Zulkefli Ahmad Makinudin J (as he then was) in the case of *Public Prosecutor v Mohd Amin bin Mohd Razali & Ors* [2002] 5 MLJ 406; [2002] 5 CLJ 281:

The position in law is that the right of an accused person to make an unsworn statement from the dock is a substantive right. However we must bear in mind that statement from the dock is not sworn evidence which can be the subject of cross examination. Not so much weight can be given to what the accused said in the dock when compared to what the accused would give under sworn evidence. This is so because when a man gives evidence one can cross-examine him and test his evidence and generally have a better opportunity of assessing him. *Nevertheless the law is very clear that the court cannot outright reject such evidence. The court must consider it and give it such weight for what it is worth and think fit having regard to the evidence adduced as a whole before the court (see the cases of Public Prosecutor v Senassi* [1970] 2 MLJ 198; [1970] 1 LNS 118 and *Muhammad Salleh v Public Prosecutor* [1969] 1 MLJ 104; [1968] 1 LNS 80). (Emphasis added.)

[24] At this stage, the prosecution had raised the issues as follows:

(a) the exhibits such as the knife (photo as in P39(28)) used to stab the deceased's backbone which was found in a bag (photo as in P39(27)) near the entrance (photos as in P39(25) and P39(26)) had clearly shown that the accused was trying to hide the knife at a consciousness mode. Not only this, the forensic team also found a black plastic bag at the living room (photo as in P39(29)) and inside the bag there were orange mattress, black/brown blanket, blue and red/green pillows tainted with the deceased's DNA as it gave an inference that the accused at her own attempt to eliminate such evidences;

(b) further, in P38 (Laporan Pemeriksaan Tempat Kejadian) under the part '19. Ulasan', there was a mop soaked inside a pail in the kitchen which was to be believed that the floor of the scene had been cleaned as only little blood trace was found at the floor of the living room. Again, the prosecution submitted that the accused was trying to destroy the evidences left at the scene;

(c) there were six knives hidden under mattress (photos in P39(43)–(53)) in PW1's room. PW1 had explained that she did not keep the knives and had no knowledge about the existence of the knives in her room. After analysis, four of the six knives were found to have tainted with the deceased's DNA profiles. The prosecution submitted that it was the act of the accused in hiding the weapons used to blame the wrongdoing to the others staying in the house;

(d) in the currect case, the examination on the accused was conducted by the medical doctors more than two years after the incident, hence the prosecution submitted the court should have reached its decision based on the facts rather than the result of the examination; and

(e) The prosecution, by referring to the case *Suresh a/l Selvaraj v Public Prosecutor* (Case No 45–4 of 2007) (unreported), submitted that the doctor's ('SD2') statements should be rejected as the doctor's findings

was purely medical insanity and not legal insanity under s 84 of the Penal Code. With this regards, the prosecution submitted that the court should have made evaluation according to the fact and not the medical test.

Legal insanity vs medical insanity

[25] In the article titled 'Recreational Ecstasy/MDMA, the serotonin syndrome, and serotonergic neurotoxicity' writted by AC Parrott at (2002) 71 Pharmacology, Biochemistry and Behavior 837–844 (D135), it emanates that this ecstasy or also known as 3,4-methylenedioxymethamphetamine ('MDMA') has become one of the most popular of the illicit recreational drugs. MDMA stimulates the release and inhibits the reuptake of serotonin (5-HT) and other neurotransmitters such as dopamine to a lesser extent. Noted that, serotonin is involved in the regulation of mood, sleep, vigilance, memory and learning, feeding and sexual behaviour, also psychiatric disorders including depression, anxiety, impulsivity, obsessive compulsive disorder, and schizophrenia which have been described in recreational ecstasy users by drug use.

[26] Guided by the above article, I believe that the accused's emotion was unstable and probably in the state of psychosis during the commission of the act where it can be reasonably inferred. On that account, supported by D133, the mental capacity of the accused during the course of the alleged act was affected by consumption of ecstasy pills. The article had stated the cognitive testing result of the heavy ecstasy user is that the most important parts (higher executive decision-making, complex information processing) are impaired, leading the court to believe reasonably at the time at which she was alleged to have committed the offence, she was by reason of unsoundness of mind, incapable of knowing the nature of the act alleged was wrong or contrary to the law although this court found that she had committed the act (see s 347 of the Criminal Procedure Code).

[27] This court is always aware of the established principle as held in the Court of Appeal case of *John a/k Nyumbei v Public Prosecutor* [2007] 7 MLJ 206; [2007] 2 CLJ 509:

> 15. *There is a distinction between the notion of a legal insanity and medical insanity*. Not every form of insanity exempts a person from criminal responsibility. *Only legal insanity provides that exemption under s 84 Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test* (see *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) p 280). As was stated recently by

this court through the judgment of Ariffin Zakaria JCA (as he then was) in *Public Prosecutor v Muhammad Suhaimi Abdul Aziz* [2004] 1 CLJ 378:

> It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See *Pendakwa Raya v Zainal Abidin bin Mat Zaid* [1993] 1 CLJ 147; *Public Prosecutor v Misbah bin Saat* [1997] 3 MLJ 495. (Emphasis added.)

[28] This court agrees that there is a clear distinction between legal and medical insanity. Nevertheless, the court is of the view that the medical expert opinion remained necessary as the doctor is the one who has professional knowledges in assisting the court to understand to what extent the medical insanity can affect one's cognitive faculties. This is the defence put forward by the defence and hence it is who raises the defence of insanity to prove so on the balance of probabilities. Then, this court would decide whether certain forms of insanity recognised by the doctors as such but not necessarily is the 'unsoundness of mind' as contemplated under s 84 of the Penal Code.

[29] The accused had given unsworn statements stating that she admitted taking ecstasy pills earlier in her working places which I would like to call this situation as 'voluntarily' substance abuse. However it had turned out that the accused obtained medical treatment where it shows the permanent condition resulting from such substance abuse. In my considered judgment, I would say that the psychotic symptoms persisted long after the substance abuse until requiring medical intervention, in which is becoming a 'disease of the mind' according to the fact of this instant case.

[30] The principle derived from *M'Naughten* [1843] All ER Rep 229 is reproduced as follows:

> ... and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of commiting the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. (Emphasis added).

[31] In order to decide whether the accused had been a person of unsound mind it must depend on the status of her mental impairment at that material time although SD2 had testified that the accused was aware of the surrounding in her daily lives. This court had assessed it carefully and vigilantly based on all the available evidences as that point in time is the key to decide the applicability of the insanity defence.

[32] After careful considerations, this court found that the accused with the persisted effects of substance abuse leading to seek for traditional treatment in Vietnam, had successfully put in the defence of insanity as the accused was affected by this mental illness when committing the offence. This is due to at that material time, the accused did not understand the nature and quality of her actions, as corroborated by SP1 who heard the accused asked the deceased why was the deceased sleeping.

Credibility of SD2

[33] The prosecution had attempted to challenge the evidences given by SD2 and discredit her expertise. However, the prosecution did not make any application to provide other expert witness to counter this before examination of SD2. Neither did the prosecution call any expert evidence to rebut the evidence of SD2 at this trial.

[34] In my considered view, this court is entitled to accept the opinion of SD2 and D133 on its face value unless the prosecution had called another expert evidence in rebuttal to contradict her.

[35] Essentially, the expert opinion given in evidence at this trial is a matter of fact. In this aspect, the court could ask the relevant questions to SD2 for clarification to enable SD2 to provide cogent reason for her conclusion (see *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). This court is not bound by the expert opinion and could form its own opinion to form its findings.

[36] The prosecution also submitted that the time of examination conducted by SD2 was too long after the incident resulting the findings might be inaccurate. Be as it may, this court would reach the same findings because the court actually made evaluation basis by scrutinising all the available evidences meticulously and not based on medical opinion solely.

[37] On the issue of delay of the doctor in examining the accused, in my opinion, this is a strong disinclination to criticise the accuracy of the medical examination due to police's negligence. Indeed, the investigating officer has a duty to uphold fairness towards the accused throughout the investigation process. Hence following the arrest and statement recording, the investigating officer should have sent the accused immediately to the medical doctors for examination. His failure should not be used by the prosecution to complaint and used for the prosecution's advantage.

[38] Therefore, after reading the facts together with assistance of SD2's opinion, this court found that reasoning given by SD2 is accepted as being credible and inherently probable.

Conducts of the accused at the scene

[39] The prosecution argued that the accused was in fact capable of knowing what she was doing was either wrong or contrary to the law during the time of the incident since the accused had tried to cover her wrongdoing by eliminating the evidences at the scene.

[40] On the issue that the accused had hidden the knife (photo as in P39(28)) in the bag (photo as in P39(27)) near the entrance (photos as in P39(25) and P39(26)) and the mattress, blanket, pillows in the black plastic bag at the living room (photo as in P39(29)), the court found all these were purely assumptions made by the prosecution without any evidence.

[41] Furthermore, the mop inside the pail was not sufficient to establish that it was the accused had used it to clean the scene since there were blood traces still remained there. The scene could have been totally cleaned if the culprit intended to wash away the evidence since there was evidence that the accused was left alone when everybody had left for the hospital.

[42] The averment about six knives were hidden under mattress (photos in P39(43)–(53)) in PW1's room was unsustainable since the prosecution had not tendered proof to confirm that it was the conduct of the accused.

[43] I am mindful, if the above-mentioned acts had actually been carried out by the accused, it was the state of mind of the accused after the incident and not during the time of the commission of the offence. Therefore, it is still relevant for the purpose of determining what was the state of mind of the accused at the time of the commission of the offence.

[44] More importantly, this court had taken into account that the accused could have fled away from the scene since she was left alone in the house after the incident if the accused knew what she was doing was contrary to law. No one can stop or hinder the accused from running away since she was left alone in the house at that significant time.

[45] Pursuant to the above, it can be readily decided that the accused truly did not understand the nature of her act at the time of killing the deceased.

CONCLUSION

[46] Accordingly, this court has no hesitation to make an order under s 347 of the Criminal Procedure Code to acquit the accused on the ground that, although the accused had committed the act, she was incapable of knowing the nature of the act to be wrong or contrary to the law by reason of unsoundness of mind.

[47] This court subsequently ordered the accused to be kept in safe custody at Hospital Bahagia, Tanjung Rambutan, Perak under s 348(1) of the Criminal Procedure Code pending the order to be made by the Ruler under s 348(2) of the Criminal Procedure Code. As such, this court shall report this case to His Royal Highness the Sultan of Selangor for the said order to be made.

Accused acquitted.

Reported by Dzulqarnain Ab Fatar